Supreme Court, U.S.
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NO. 99-1746

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1999 Term

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

HERBERT ANDERSON,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE LOUISIANA SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR *CERTIORARI* OF WATERMAN STEAMSHIP CORPORATION

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I. THE RULING BY THE LOUISIANA SUPREME COURT CONSTITUTES A "FINAL DECREE" FOR PURPOSES OF 28 U.S.C. SECTION 1257

The federal issues in this case have been finally resolved by the highest court in Louisiana. The ruling by the Louisiana Supreme Court to deprive Waterman of its immunity under 46 U.S.C. section 745 constitutes a "final decree" within the meaning of 28 U.S.C. section 1257. That ruling is not subject to further review or correction in any other state tribunal. This is a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

Respondent's reliance upon *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75(1997) is misplaced. The state court ruling on the federal issue in that case was not final because "the City maintains that its fire department responded promptly to the call... If the City prevails on this account of the facts, then any section 1983 claim will necessarily fail, however incorrect the Alabama Supreme Court's ruling, for the city will have established that its actions did not cause Ms. Jefferson's death." 522 U.S. at 82. In this case, on the other hand, liability for maintenance and cure is automatic, without the necessity for any showing of fault. Respondent was injured while in the service of the ship. Irrespective of fault, Waterman will face liability for unpaid maintenance and cure if it is stripped of its 46 U.S.C. section 745 immunity. Whereas an absence of

fault could have mooted the federal issues in *Jefferson v. City of Tarrant, Alabama*, the federal issue in this case will not be mooted by an absence of fault on the part of Waterman. The duty to pay maintenance and cure is imposed "irrespective of the absence of shipowner negligence". *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975).

The only other case Respondent cites in support of his theory that the ruling by the Louisiana Supreme Court is not final for purposes of 28 U.S.C. section 1257 is *Adams v. Robertson*, 520 U.S. 83 (1997). This Court declined to consider the federal claim in *Adams* because the petitioners did not present their federal claim in the lower court with "fair precision and in due time." 520 U.S. at 88. In this case, on the other hand, Waterman timely raised its federal claims with fair precision. The motion for summary judgment specifically asserted that Waterman is immune from suit by virtue of the exclusivity of liability provisions of 46 U.S.C. section 745. The denial of that motion was timely reviewed by the Louisiana appellate courts, and has been properly brought before this Court.

II. LIABILITY FOR RESPONDENT'S CLAIMS IS TRANSFERRED TO THE UNITED STATES BY VIRTUE OF THE SUITS IN ADMIRALTY ACT.

Respondent's opposition merely restates the obvious, which is, that in order to show a vessel was "operated by" the United States for purposes of 46 U.S.C. section 741, it must be shown that the United

States exercised operational control over the vessel.

The "operational control" test, while relevant to show a vessel was "operated by" the United States, is not applicable when a vessel is "operated for" the United States by a private company. The SIAA applies where a vessel is privately operated for the United States, even if the government does not exercise operational control over minute aspects of day to day activities aboard the ship. *Calmar S.S. Corp. v. United States*, 345 U.S. 446 (1953); *Johnson v. United States Shipping Board Emergency Fleet Corporation*, 280 U.S. 320 (1929); *Nakano v. United States and Vessel Charters, Inc.*, 1988 AMC 2220 (S.D.Cal.1988); *Western Tankers Corp. v. U.S.A.*, 1975 A.M.C. 775 (S.D. N.Y. 1975); *Peneiro v. United States*, 65 F.Supp. 191, 192 (N.D. Cal. 1945); *Burkholder v. U.S.*, 56 F.Supp. 106, 109 (E.D. Penn. 1944); *Olavarria & Co. v. United States*, 56 F.Supp. 758 (S.D. Ala.1944); *Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation*, 266 F.897 (E.D.Pa.1920).

If Congress had intended the Act to apply only if a ship were operated by the United States, *i.e.*, if the United States exercised operational control over a ship, then there would have been no need for Congress to have added the additional clause stating the Act applies if a vessel is "operated for" the United States. See, 46 U.S.C. section 741.

The MAJOR STEPHEN PLESS was being operated for the United States of America by Waterman Steamship Corporation, and was carrying exclusively military cargo. Sections 741-742 of the Suits in Admiralty Act therefore supply a jurisdictional hook for suit by Anderson against the United States.

Once a jurisdictional hook under the Act has been established, the next inquiry is whether there would be a basis to impose liability upon the United States. This can be accomplished in either of two ways. The first method by which liability can be imposed upon the United States under the SIAA is if the United States, in its capacity as a charterer, would have been liable if it were a private party. Respondent devotes much of his brief to his theory that in order for a private time charterer to have liability for an injury aboard a vessel, the charterer must have exercised operational control. This argument overlooks the second basis by which liability can be imposed upon the United States under the SIAA, namely, if the vessel itself would face potential liability if it were privately owned.

The United States can be held liable under the SIAA not just if a private time charterer could have been held liable under similar circumstances, but also, if the vessel itself could have been held liable if it were privately owned. "The apparent intent of sections 1 and 2 of the act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course

of transportation, and to substitute for an action *in rem* against the vessel or cargo an action *in personam*." *Banque-Russo Asiatique–London v. United States Shipping Board Emergency Fleet Corporation*, 266 F.897 (E.D.Pa.1920) (emphasis added).

The SIAA substitutes liability of the United States in place of liability that could have been imposed upon a vessel being operated for the United States. The SIAA operates "to substitute the Government for the vessel or the cargo... It is generally conceded that the Suits in Admiralty Act of March 1920 substitutes a remedy *in personam* against the United States for one in rem." *Olavarria & Co. v. United States*, 56 F.Supp. 758, 759 (S.D. Ala.1944) "[A] cause of action *in personam* against the United States may be maintained ... in those cases where the libelant would have a cause of action *in rem*..." *Id.* at 760 (emphasis added).

Respondent myopically focuses on operational control being needed to establish *in personam* liability, but fails to grasp that liability is also transferred to the United States of America pursuant to the Suits in Admiralty Act "if the suit could be maintained against a private vessel when the suit was filed." *Id.* at 762.

Many of the cases Respondent has used to try to prop up his theory did not even involve claims that exposed a vessel to *in rem* liability, and therefore have no applicability here. For example, *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir.1989) involved only Jones Act negligence and alleged general maritime

law negligence, but not unseaworthiness or maintenance and cure. The Fifth Circuit therefore did not have to address whether *in rem* liability of the S.S. BAY would have arisen, and only assessed whether the United States would have had *in personam* liability. The issue here is not whether the United States would have liability in its capacity as charterer of the MAJOR STEPHEN PLESS, but rather, whether the vessel itself would face liability for Respondent's claims.

Anderson's reliance upon *Favorite v. Marine Personnel & Provisioning, Inc.*, 955 F.2d 382 (5th Cir. 1992) is also misplaced. Clifton Favorite was injured while working aboard a vessel that had been bareboat chartered to the United States. The Fifth Circuit held that "as the bareboat charterer, the United States did not need to assume liability; the liability attached with the bareboat charter." Accordingly, the injured seaman's exclusive remedy lay against the United States, and the operator of the vessel was immune from suit pursuant to the exclusivity of liability provision of the SIAA. All of plaintiff's claims against the private operator were dismissed pursuant to the exclusivity of liability provisions of the SIAA, including his Jones Act claims as well as unseaworthiness and maintenance and cure claims. *Favorite*, 955 F.2d at 385.

Another case Respondent mistakenly relies upon for his "operational control" theory is *Morales-Melendez v. Steamship Mutual Underwriting Association*, 763 F.Supp. 1174 (D.P.R.1991). The plaintiff in *Morales-Melendez* was a marine cargo inspector who was not a

member of the crew of the M/V PAUL BUCK, a vessel under time charter to the Military Sealift Command. 763 F.Supp. at 1176, 1177 n.6. Unlike crewmember Herbert Anderson, the non-crewmember cargo inspector in *Morales-Melendez* was not owed any warranty of seaworthiness, and had no entitlement to maintenance and cure. Rather, his claims were exclusively *in personam* negligence claims. Since a private time charterer that did not exercise operational control would not have faced liability for his negligence claims, no liability was imposed upon the United States. The M/V PAUL BUCK was not exposed to liability by his claims, since they sounded exclusively in negligence. *In rem* liability of the M/V PAUL BUCK was therefore not transferred to the United States under the SIAA. In this case, on the other hand, Respondent's unseaworthiness and his maintenance and cure claims expose the MAJOR STEPHEN PLESS to *in rem* liability, and that liability is transferred to the United States by the SIAA.

Another case that provides Anderson no support for his theory but which he nonetheless cites in opposition to the Petition for *Certiorari* is *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir.1982). The Fifth Circuit therein affirmed the district court holding that the diving barge to which Trautman had been assigned was not operated by or for the United States and "accordingly the United States owed no warranty of seaworthiness to appellant." 693 F.2d at 442. Obviously, since Trautman was owed no warranty of seaworthiness, there was no vessel operated by or for

the United States subjected to potential *in rem* liability.

Trautman cites to *J.W. Petersen Coal & Co v. United States*, 323 F.Supp. 1198, 1205-06 (N.D.Ill.1970) in its discussion of how control by the United States is required in order to support a finding that a vessel was operated *by* the United States. That case properly draws the distinction between operational control being exercised by the government when a vessel is being operated *by* the government, and control being exercised by a private company when the vessel is being operated *for* the United States. Whereas "extensive operation or direction of the vessel by government personnel would be required to make the vessel operated *'by the United States'*", the court observed that in a time charter situation where a vessel is operated "*for the United States*", the private "owner may control the operation of the vessel's personnel and equipment". 323 F.Supp. at 1205-06 (emphasis added). Thus, while operational control by the United States is necessary in order to show that a vessel is operated *by the United States*, there is no such requirement in order to show that a vessel is operated *for the United States*.

CONCLUSION

Anderson's unseaworthiness and his maintenance and cure claims expose the MAJOR STEPHEN PLESS to potential *in rem* liability. Since the vessel was being operated for the United States, and faces potential *in rem* liability, liability for Anderson's claims is

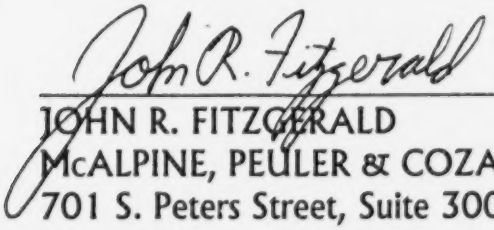
automatically transferred to the United States of America pursuant to section 742 of the Suits in Admiralty Act. Waterman Steamship Corporation, the private operator of the vessel, is shielded from liability by virtue of section 745 of the Act, even if its "act or omission gave rise to the claim." 46 U.S.C. section 745.

The ruling of the Louisiana Supreme Court exposes to arrest privately operated vessels carrying exclusively military cargo. The Supreme Court should consider this matter in light of the profound and detrimental consequences the ruling has upon the ability of the United States Military Sealift Command to ensure that cargo needed to support military operations abroad will not be delayed or halted by vessel arrests on personal injury claims. The only statute barring such vessel arrests is the Suits in Admiralty Act. The Louisiana Supreme Court has rendered nugatory the provision of 46 U.S.C. section 741 that states the SIAA applies where vessels are "operated for" the United States. The ruling by the highest state court in Louisiana misconstrues the Act as applying only where the government exercises operational control over the day to day activities aboard a vessel, a test unlikely to be met where vessels hauling ammunition and military supplies are privately operated by companies such as Waterman Steamship Corporation.

WHEREFORE, this Court should GRANT Waterman's Petition for *Certiorari*, and REVERSE the ruling of the Louisiana Supreme Court that improperly stripped Waterman of its 46 U.S.C. section 745 immunity.

DATED this 22nd day of June, 2000.

Respectfully submitted,



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